

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH WILLIAM DROPALSKI,
Petitioner,
v.
BELINDA STEWART,
Respondent.

Case No. C06-5697 FDB/KLS

REPORT AND RECOMMENDATION

**NOTED FOR:
APRIL 20, 2007**

This habeas corpus action has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Petitioner filed this action under 28 U.S.C. § 2254, challenging his conviction. (Dkt. # 5). Petitioner has filed a petition, affidavit and memorandum with exhibits in support of his petition. (Dkt. # 5, 6, 7). Respondent has filed a timely answer in opposition. (Dkt. # 13). Having reviewed the parties' submissions and the state court record (Dkt. # 14), the undersigned agrees that the petition is time barred and recommends that the petition be **DISMISSED WITH PREJUDICE**.

I. BASIS FOR CUSTODY

Petitioner is confined at the Stafford Creek Correctional Center (SCC). In 2002, the court found Petitioner guilty, by plea, of one count of vehicular homicide via DUI, one count of vehicular

1 assault via DUI, and one count of third-degree driving with a suspended license. (Dkt. # 14, Exh. 1).
 2 Petitioner received an exceptional sentence of 171 months. (*Id.* at 5). On the same day, the court
 3 found him guilty, by plea, of two counts of methamphetamine delivery. (*Id.*, Exh. 2). The court
 4 sentenced Petitioner to 114 months of confinement. (*Id.*, Exh. 2 at 5). The court ordered the two
 5 sentences to run consecutively. (*Id.*).
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8 II. STATEMENT OF THE CASE

9 **A. State Court Procedural History**

10 Petitioner appealed. (*Id.*, Exh. 3, ACORDS Printout, Cause No. 28319-1; Exh. 4, ACORDS
 11 printout 28322-1¹). The Court of Appeals upheld Petitioner's exceptional sentences, but remanded
 12 for correction of his offender scores. (*Id.*, Exh. 5). Petitioner petitioned for review. (*Id.*, Exh. 6).
 13 On February 3, 2004, the Court denied the petition. (*Id.*, Exh. 7).

14 On December 16, 2004, Petitioner filed a motion to modify his sentence, which the superior
 15 court transferred to the Court of Appeals as a personal restraint petition. (*Id.*, Exh. 8). The Court of
 16 Appeals dismissed the petition. (*Id.*, Exh. 9). Petitioner filed a petition for review. (*Id.*, Exh. 10).
 17 The Supreme Court denied review. (*Id.*, Exh. 11). Petitioner moved to modify. (*Id.*, Exh. 12). The
 18 Supreme Court denied the motion on January 11, 2006. (*Id.*, Exh. 13).

19 **B. Federal Court Proceedings**

20 On November 29, 2006, Petitioner signed his habeas corpus petition. (Dkt. # 5). Petitioner
 21 presents this Court with the following grounds for relief:

22 GROUND ONE: Sentence was imposed in violation of a firmly established decision by
 23 the Supreme Court of the United States.

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 27 ¹Respondent refers to ACORDS printouts for these two cause numbers because she currently
 28 does not have these two files. Respondent obtained some of the pleadings in these cases from
 Petitioner's other state court files.

1 GROUND TWO: The Court lacked statutory authority or jurisdiction in imposing an
2 exceptional sentence, based on facts neither admitted by the defendant nor proven
3 beyond a reasonable doubt.

4 GROUND THREE: The plea agreement was invalid and unconstitutional.

5 GROUND FOUR: The State erred in calculation of my offender score(s) and motioned
6 for remand to correct the error.

7 (Id. at 5-6).

8 III. EXHAUSTION OF STATE REMEDIES

9 Because the petition is untimely under the statute of limitations, 28 U.S.C. § 2244(d), the
10 Court need not determine whether petitioner properly exhausted his available state remedies. 28
11 U.S.C. § 2254(b)(2).

12 IV. EVIDENTIARY HEARING

13 A petitioner who fails to develop the factual basis of a claim in state court is not entitled to
14 an evidentiary hearing unless the claim relies on:

15 (i) a new rule of constitutional law, made retroactive to cases on collateral review by the
16 Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have
17 been previously discovered through the exercise of due diligence; and (B) the facts underlying
18 the claim would be sufficient to establish by clear and convincing evidence that but for
19 constitutional error, no reasonable factfinder would have found the applicant guilty of the
20 underlying offense

21 28 U.S.C. § 2254(e)(2).

22 The decision to hold a hearing is committed to the court's discretion. *Williams v. Woodford*,
23 306 F.3d 665, 688 (9th Cir. 2002). A hearing is not required unless the petitioner "alleges facts
24 which, if proved, would entitle him to relief." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). The
25 petitioner must produce some evidence demonstrating the existence of a genuine question of material
26 fact. *Morris v. State of California*, 966 F.2d 448, 454-55 (9th Cir. 1991), *cert. denied*, 506 U.S.
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1 831 (1992). A hearing is not required if the claim presents a purely legal question or may be resolved
 2 by reference to the state court record. *Campbell v. Wood*, 18 F.2d 662, 679 (9th Cir.) (en banc),
 3 cert. denied, 511 U.S. 1119 (1994). Because the petition in this case is untimely, Petitioner cannot
 4 satisfy these standards, and he is not entitled to an evidentiary hearing.

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6 **V. STANDARD OF REVIEW**

7 A federal petition for writ of *habeas corpus* filed on behalf of a person in custody pursuant to
 8 a judgment of a state court, shall not be granted with respect to any claim that was adjudicated on
 9 the merits in State court proceedings unless the adjudication of the claim:

10 (1) resulted in a decision that was contrary to, or involved an unreasonable
 11 application of, clearly established Federal law, as determined by the Supreme
 12 Court of the United States; or
 13 (2) resulted in a decision that was based on an unreasonable determination of the
 14 facts in light of the evidence presented in the State court proceeding.

15 28 U.S.C. § 2254(d).

16 State court judgments carry a presumption of finality and legality. *McKenzie v. McCormick*,
 17 27 F.3d 1415, 1418 (9th Cir. 1994), cert. denied, 513 U.S. 1118 (1995). Federal habeas corpus
 18 relief does not lie for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). The petitioner
 19 must prove the custody violates the Constitution, laws or treaties of the United States. *McKenzie*,
 20 27 F.3d at 1418-19. If a petitioner establishes a constitutional trial error, the Court must determine
 21 if the error caused actual prejudice. *Brech v. Abrahamson*, 507 U.S. 619, 637-39 (1993).

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24 **VI. DISCUSSION**

25 A. **The Habeas Corpus Petition is Untimely Under The Federal Statute Of Limitations, 28**
 26 **U.S.C. § 2244(d).**

27 The Antiterrorism and Effective Death Penalty Act (AEDPA) established a statute of

1 limitations for habeas corpus petitions. 28 U.S.C. § 2244(d). For petitioners whose state court
 2 judgments became final prior to April 24, 1996, the one-year time period began running on the date
 3 the statute was signed into law and expired on April 23, 1997. *Calderon v. United States Dist.*
 4 *Court for the Cent. Dist. of Cal. (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied*, 522
 5 U.S. 1099 (1998). The statute of limitations is subject to equitable tolling, but such tolling “will not
 6 be available in most cases, as extensions of time will only be granted if ‘extraordinary circumstances’
 7 beyond a prisoner’s control make it impossible to file a petition on time.” *Id.* at 1288 (citing *Alvarez-*
 8 *Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996)).

10 Where the challenged conviction became final after April 24, 1996, the statute generally
 11 begins to run from one of the following four dates:

12 (A) the date on which the judgment became final by conclusion of direct review or
 13 the expiration of the time for seeking such review;

14 (B) the date on which the impediment to filing an application created by State
 15 action in violation of the Constitution or laws of the United States is removed,
 16 if the applicant was prevented from filing such state action;

17 (C) the date on which the constitutional right asserted was initially recognized by
 18 the Supreme Court, if the right has been newly recognized by the Supreme
 19 Court and made retroactively applicable to cases on collateral review; or

20 (D) the date on which the factual predicate of the claim or claims presented could
 21 have been discovered through the exercise of due diligence.

22 28 U.S.C. § 2244(d)(1).

23 Direct review ordinarily concludes either upon the expiration of the time for filing a petition
 24 for writ of certiorari, or when the Supreme Court rules on a petition for writ of certiorari. *Bowen v.*
Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999). A petitioner seeking review of a judgment of a lower
 25 state court must file the petition for writ of certiorari “within 90 days after entry of the order denying
 26 discretionary review.” Sup. Ct. Rule 13(1). “The time during which a properly filed application for
 27 State post-conviction or other collateral review with respect to the pertinent judgment or claim is
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1 pending shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. §
 2 2244(d)(2).

3 The statute of limitations tolls only during the time a properly filed post-conviction, collateral
 4 challenge is pending in state court. 28 U.S.C. § 2244(d)(2); *Nino v. Galaza*, 183 F.3d 1003 (9th Cir.
 5 1999). A state court petition rejected as untimely is not ‘properly filed,’ and is not entitled to
 6 statutory tolling under section 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807,
 7 1814 (2005).

8 The Supreme Court denied the petition for review on February 3, 2004. (*Id.*, Exh. 7).
 9 Therefore, AEDPA’s § 2244(d) one-year statute of limitations started to run in Petitioner’s case on May
 10 3, 2004, 90 days from that date.

11 The statute ran for 227 days from May 3, 2004 until December 16, 2004, when Petitioner
 12 filed his personal restraint petition. (*Id.*, Exh. 8). The statute was tolled until January 11, 2006, the
 13 day the Supreme Court denied his motion to modify. (*Id.*, Exh. 13; § 2244(d)(2)). The statute ran
 14 again for 322 days until November 29, 2006, when Petitioner signed his habeas corpus petition.
 15 (Dkt. # 5). The total number of days that ran between the date his conviction became final and the
 16 date he signed his habeas corpus petition, a total of 549 days, far exceeded §2244(d) one-year
 17 statute of limitations.

18 Accordingly, Petitioner’s habeas corpus petition is time-barred. The time bar precludes this
 19 Court’s review of the merits of his habeas corpus petition, unless the statute of limitations is subject
 20 to equitable tolling.

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 25 **B. Equitable Tolling Is Unavailable**

26 Although the “AEDPA’s statute of limitations is subject to equitable tolling,” it is
 27 “unavailable in most cases.” *Corjasso*, 278 F.3d at 877 (citation omitted). Equitable tolling “is
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1 appropriate only ‘if extraordinary circumstances beyond a prisoner’s control make it impossible to
2 file a petition on time.’” *Id.* (citations omitted); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir.
3 2001); *Allen v. Lewis*, 255 F.3d 798, 799-800 (9th Cir. 2001). “External forces,” not petitioner’s
4 “lack of diligence” must account for his failure to file a timely petition. *Miles v. Prunty*, 187 F.3d
5 1104, 1107 (9th Cir. 1999). Ignorance of the law, “even for an incarcerated pro se petitioner,
6 generally does not excuse prompt filing.” *Marsh v. Soares*, 223 F.3d 1217, 1220 (9th Cir. 2000).
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8 There are no grounds for equitable tolling in this case. There is no evidence of conduct by
9 the State or by Respondents which impeded petitioner’s ability to file his federal petition in a timely
10 manner. There is no evidence of lack of clarity in the law or legal unavailability of claims preventing
11 Petitioner from filing his petition or some other extraordinary or unforeseen impediment over which
12 he had no control.

13 There are no extraordinary circumstances evident in this case requiring application of
14 equitable tolling principles. Therefore, the petition is barred and must be dismissed under 28 U.S.C.
15 § 2244(d).
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19 **VII. CONCLUSION**

20 This petition is time barred. Accordingly, the petition should be **DISMISSED WITH**
21 **PREJUDICE.** A proposed order accompanies this Report and Recommendation.

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23 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,
24 the parties shall have ten (10) days from service of this Report and Recommendation to file written
25 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
26 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time
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1 limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **April 20,**
2 **2007**, as noted in the caption.

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Dated this 2nd day of April, 2007.

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8 Karen L. Strombom
9 United States Magistrate Judge
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